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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE TRUSTEES OF COLUMBIA
UNIVERSITY IN THE CITY OF NEW YORK,
Employer,

and

Case 02-RC-143012

GRADUATE WORKERS OF
COLUMBIA-GWC, UAW,
Petitioner.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) submits this *amicus curiae* brief in response to the Board’s Notice and Invitation for Briefs. The question presented by this case is whether graduate assistants¹ are employees under the NLRA. As graduate assistants are employees under the common law, and there is no compelling policy justification to exclude them from the Act, the Board should overrule *Brown University*, 342 NLRB 483 (2004).

1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act?

The Board in *Brown* “declare[d] the Federal law to be that graduate students are not employees within the meaning of Section 2(3) of the Act.” 342 NLRB at 493. That declaration is contrary to the terms of Section 2(3) and to the common law definition of “employee” that informs the proper interpretation of those statutory terms. The *Brown* majority’s reasoning for

¹ The petition in this case includes a number of student assistant classifications that may be filled by doctoral, masters, or undergraduate students. For simplicity, this brief uses the term “graduate assistant” to encompass all of these categories, except when it is necessary to differentiate between categories.

excluding graduate assistants from the Act's broad definition of "employee" was flawed and unsupported. Therefore, the Board should overrule *Brown* and return to its understanding that, where "the fulfillment of the duties of a graduate assistant requires performance of work, controlled by the Employer, and in exchange for consideration," "the graduate assistants are statutory employees, notwithstanding that they simultaneously are enrolled as students." *New York University*, 332 NLRB 1205, 1207, 1209 (2000).

Graduate Assistants are Employees under the Common Law

The Act grants its rights and protections to "employees," which it defines to "include any employee" not "limited to the employees of a particular employer, unless this subchapter explicitly states otherwise." 29 U.S.C. § 152(3). "The breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.' The only limitations are specific exemptions [in the Act]." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984). "The exclusions listed in the statute are limited and narrow, and do not, on their face, encompass the category 'student.'" *Boston Medical Center Corp.*, 330 NLRB 152, 160 (1999). The Supreme Court has counseled that a "broad, literal interpretation of the word 'employee' is consistent with several of the Act's purposes, such as protecting the right of employees to organize for mutual aid without employer interference and encouraging and protecting the collective-bargaining process." *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 91 (1995)(quotation marks and citations omitted). Thus, if graduate assistants are "employees," they are due the protections of the Act.

"In determining whether an employment relationship exists for purposes of the Act, the Board must follow the common-law agency test." *Browning-Ferris Industries of Cal., Inc.*, 362 NLRB No. 186, slip op. 12 (2015). See also *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992) (Congress intended for use of "a common-law test for determining who

qualifies as an ‘employee’ under [statutes that offer little guidance in defining the term].”). “At common law, a servant [is] one who perform[s] services for another and [is] subject to the other’s control or right of control. Consideration, i.e., payment, is strongly indicative of employee status.” *Boston Medical Center*, 330 NLRB at 160.

The recently published *Restatement of Employment Law* (2015) describes the conditions for the existence of an employment relationship generally as follows:

“[A]n individual renders services as an employee of an employer if:

- (1) The individual acts, *at least in part*, to serve the interests of the employer;
- (2) The employer consents to receive the individual’s services; and
- (3) The employer controls the manner and means by which the individual renders services, or the employer otherwise effectively prevents the individual from rendering those services as an independent businessperson.” § 1.01(a)(emphasis added).²

The *Restatement* applies this test to determine that “[w]here an educational institution compensates student assistants for performing services that benefit the institution,... such compensation encourages the student to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship.” § 1.02, p. 25.

The *Restatement*’s illustration of this point is directly relevant to this case:

“A is a graduate student in biochemistry at university P. In order to complete the degree requirements, A must work in a laboratory under P’s auspices, either for pay or as a volunteer. A works in the laboratory of a professor, for which A is paid a yearly stipend and given full tuition remission. The professor has secured grants to support the research that A is assisting. A is an employee of P. P is providing A with significant benefits both in order to further A’s education and also to obtain A’s services on P’s funded research.” *Id.*

² This distillation of the common-law employment test incorporates the *Restatement (Second) of Agency* (1958) § 220, which the Board in *Browning-Ferris Industries of Cal., Inc.*, *supra*, acknowledged offers guidance in determining whether a common-law employment relationship exists. Slip op. at 12.

Therefore, graduate assistants are employees under the common law, making them statutory employees under the “broad, literal interpretation of the word ‘employee,’” that “is consistent with several of the Act’s purposes.”

This determination is in line with Board precedent involving persons who work in positions that combine training and the provision of services. *See Chinatown Planning Council, Inc.*, 290 NLRB 1091, 1095 (1988), *enf’d*, 875 F.2d 395 (2d Cir. 1989)(apprentices “are working at regular trade occupations while receiving on-the-job training.”); *Beecher Ancillary Servs., Inc.*, 225 NLRB 642, 642 (1976)(“student-trainees are receiving on-the-job training under the watchful eye of skilled workers.”). Apprenticeship programs often include a classroom component, yet the fact that apprentices’ on-the-job training is, in part, for their educational benefit does not preclude them from being employees under the Act. *See Newport News Shipbuilding and Dry Dock Co.*, 57 NLRB 1053, 1058-59 (1944); *General Motors Corp.*, 133 NLRB 1063, 1064-65 (1961). Higher education employers simply structure their apprentice programs differently from industrial, construction and other employers, adjusting the mix of classroom time and on-the-job training and providing a different compensation package. But the fact is that in each of these sectors, novice employees provide services in exchange for compensation. If graduate assistants are not employees under the Act, as *Brown* determined, then the well-established employee status of workers in these other on-the-job training programs would also be subject to question.

Graduate Assistants Perform Services for the Universities in Exchange for Compensation

It is indisputable that graduate assistants provide services to universities that are essential to the institutions’ central functions. Graduate assistants teach low-level courses with large enrollment; they lead discussion groups, labs, and small sections attached to large lecture course;

they tutor, staff help rooms, and hold office hours; they grade homework, papers, and exams; they teach their own courses; they conduct research and check citations to advance professors' academic productivity; and they perform administrative and clerical duties.

“Graduate student TAs accounted for 19.4% of teachers in higher education in 2007 (25.0% in four-year institutions); full-time tenure and tenure-track faculty members made up only 25.1% (27.5% in four-year institution).” Modern Language Association (MLA), *Issue Brief: The Academic Workforce* 5 (2009), https://www.mla.org/content/download/3064/80610/awak_issuebrief09final.pdf. The Coalition on the Academic Workplace, a group of 25 academic societies, found in a survey of nine disciplines in the fall of 1999 that graduate students comprised 15 to 25% of the instructional staff in the majority of disciplines. American Historical Association, *Who is Teaching in U.S. College Classrooms?* (1999), <https://www.historians.org/about-aha-and-membership/aha-history-and-archives/archives/who-is-teaching-in-us-college-classrooms>. This percentage may be even higher at doctorate-granting universities like Columbia University. See American Association of University Professors, *The Employment Status of Instructional Staff Members in Higher Education, Fall 2011* 7 (2014), <http://www.aaup.org/sites/default/files/files/AAUP-InstrStaff2011-April2014.pdf> (showing TAs comprised 39.5% of instructional staff at this category of universities); MLA, *Education in the Balance: A Report on the Academic Workforce in English* 30 (2008), https://www.mla.org/content/download/3255/81374/workforce_rpt03.pdf (showing 36.6% of faculty members in English Departments at doctoral/research universities are graduate student teaching assistants). According to one estimate, graduate students teach 16 to 32% of all undergraduate sections offered by public universities. JBL Associates, Inc., *Reversing Course: The Troubled State of Academic Staffing and a Path Forward* 13 (2008), <http://files.eric.ed.gov/fulltext/ED503538.pdf>

(study prepared for the American Federation of Teachers). This is in line with other estimates. See Peter Monaghan, *University Officials Deplore the Lack of Adequate Training Given to Teaching Assistants, Ponder How to Improve It*, Chron. of Higher Educ., Nov. 29, 1989, at A17 (teaching assistants teach 25% of undergraduate courses “or an even bigger proportion.”).

Teaching assistants do not simply constitute a significant portion of instructional faculty, but often “provide the staff for courses offered to first- and second-year undergraduates – a task many tenured faculty members resist.” Patricia Cohen, *The Long-Haul Degree*, N.Y. Times, April 18, 2010, at ED28. One survey of English Departments found that graduate teaching assistants taught 42.9% of first year writing courses, and 28.3% of lower-division undergraduate courses. MLA, *Education in the Balance*, *supra*, at 30. Graduate teaching assistants teach 57.4% of first-year language courses in doctoral-degree-granting language departments. MLA, *Foreign Language and Higher Education: New Structures for a Changed World* 6 (2007), https://www.mla.org/content/download/3197/81142/forlang_news_pdf. Teaching assistants “are responsible for a significant proportion (as high as 91%) of undergraduate instruction in science, technology, engineering, and mathematics (STEM) disciplines, particularly in introductory laboratory courses.” Sara A. Wyse et al., *Teaching Assistant Professional Development in Biology: Designed for and Driven by Multidimensional Data*; CBE Life Sciences Educ., Summer 2014, at 212, 212, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4041500/> (internal citations omitted).

These statistics demonstrate how much universities rely on graduate assistants to fill instructional needs that full-time faculty would prefer not to meet, and Columbia University is no different. Columbia requires that all undergraduates in its College fulfill certain course requirements; students in the School of Engineering must take half of the courses in the Core

Curriculum and those in the School of General Studies may also take Core Curriculum courses. Regional Director's Supplemental Direction and Order Dismissing Petition (SDODP) 8. Due to the demand for these courses, there is a substantial need for instructors. Consistent with the national data, graduate assistants meet this large need for the University. "A significant number of graduate students serving in positions included in the petitioned-for unit have instructional roles in courses which are part of [the]... Core Curriculum." *Id.*

Graduate teaching assistants additionally perform a number of duties related to lower-level undergraduate courses within individual departments. Teaching Fellows in the Mathematics Department teach introductory Calculus or Algebra classes, staff the Math Help Room, grade homework, write and grade exams, and hold office hours. *Id.* at 16. Physics Teaching Fellows teach lab sections, grade lab reports, staff the Physics Help Room, and proctor and grade exams. *Id.* at 17. Teaching Assistants in the Department of Art History and Archeology lead small discussion sections of large lecture classes, and teach small sections of the Core Curriculum Art Humanities course. *Id.* at 18. Due to the demand for this class, the department runs 40 small sections for it, with an instructional roster that includes eight to twelve graduate students along with post-doctoral fellows and adjuncts, but only two to five regular faculty members. *Id.* Teaching Fellows in the Department of Germanic Languages and Literature teach elementary German, then move on to intermediate and advanced German. *Id.* at 19. Depending on the number of Fellows and the demand for elementary German, the Fellows may end up teaching all of the elementary German classes. *Id.* The other language departments operate similarly. *Id.* Graduate assistants in the Engineering School relieve full-time staff of a number of duties by grading homework and exams, holding office hours, copying, maintaining

grade books, lecturing as needed, holding recitations, running labs, and assisting undergraduates with lab experiments. *Id.* at 22-23.

Columbia University provides compensation in exchange for the valuable services performed by graduate assistants. It is not disputed that the graduate assistants' tuition remission and stipend is conditioned on performance of these services for the University. Graduate assistants must provide teaching or research service for at least three of the five years for which Columbia guarantees it will pay their tuition as well as a stipend. *Id.* at 6. After those five years, departments in the Graduate School of Arts and Sciences may offer students teaching positions as long as the department has a demonstrable need. *Id.* Students appointed to those positions receive the same stipend, tuition, and fees package as they received in their first five years. *Id.* Students who secure external fellowships can choose to not teach, and have their package reduced by the fellowship amount. *Id.* at 7, fn. 6. Alternately, they can teach, receive a supplement to their fellowship, and bank the opportunity to remain enrolled without a service obligation. *Id.* These facts indicate that the Employer views the teaching and research appointments as work that meets a demonstrable need of the University for which graduate assistants receive compensation in the form of their funding packages.

Brown's Reasoning Does Not Justify Excluding Graduate Assistants from the Protections of the Act

The *Brown* majority made no real attempt to dispute the fact that graduate assistants satisfy the common law test for employees. *See Brown University*, 342 NLRB at 491. The majority asserted instead that the "issue of employee status turns on whether Congress intended to cover the individual in question," regardless of whether the individual meets the common law definition of employee. *Id.* This is of course in tension with *Town & Country*, *supra*, and

Boston Medical Center, supra, which suggest that Congress intended the Act to cover individuals that meet the common law definition of employee.

Regardless, the Board in *Brown* held that Congress did not intend graduate assistants to be covered because they are “primarily students,” and their relationship with the employer is “primarily educational.” *Id.* at 488. Basing employee status on the “primary” basis of the relationship with the employer is at odds with the plain language of the Act, the common law, the *Restatement*, *Boston Medical Center*, and the great weight of authority from state courts and agencies that have addressed this issue.

The *Restatement* provides that an individual is an employee if the “individual acts, *at least in part*, to serve the interests of the employer.” § 1.01, p. 2 (emphasis added). An individual that works at least in part to serve the interests of the employer offers that employer “an opportunity to benefit from the individual’s activity.” *Id.* Employers such as Columbia University receive a benefit from the services of the graduate assistants, regardless of whether those graduate assistants also receive an educational benefit in addition to compensation. Graduate assistants benefit Columbia by filling teaching and research needs at the university. The fact that these graduate assistants also “obtain educational benefits from their employment is not inconsistent with employee status.” *New York University*, 332 NLRB 1205, 1207 (2000) (quotation marks and citation omitted).

The Board in *Boston Medical Center* had no difficulty finding hospital house staff to be both students and statutory employees. The Board held, “Ample evidence exists here to support our finding that interns, residents and fellows fall within the broad definition of ‘employee’ under Section 2(3), notwithstanding that a purpose of their being at a hospital may also be, in part, educational. That house staff may also be students does not thereby change the evidence of

their ‘employee’ status.” *Boston Medical Center*, 330 NLRB at 160. In other words, that workers are also students is irrelevant to the employee status analysis. The *Brown* majority’s attempt to avoid *Boston Medical Center* by dismissing its applicability based on the fact that the house staff had already received their academic degrees is misguided. *Brown*, 342 NLRB at 487. The *Boston Medical Center* analysis turned on the existence of indicia of an employment relationship, not on whether or not the interns and residents were students who had not yet received their academic degrees. See *Boston Medical Center*, 330 NLRB at 160-161.

Additionally, nearly every state court or agency that has examined the question of whether graduate assistants are employees for collective bargaining purposes have found that they are.³ Many have specifically rejected the notion that individuals cannot be students and statutory employees. See *House Officers Assoc. for the Univ. of Neb. Med. Center v. Univ. of Neb. Med. Center*, 198 Neb. 697, 703-04; 255 N.W.2d 258, 262 (Neb. 1977)(“We find nothing in the stated purpose of the act that would indicate that the Legislature intended that persons who are students but also employees of the University of Nebraska should be exempted from the provisions of the act.”); *Regents of the Univ. of Mich. v. Employment Relations Comm.*, 389 Mich. 96, 112; 204 N.W.2d 218, 226 (Mich. 1973)(“We do not regard these two categories [of student and employee] as mutually exclusive. Interns, residents and post-doctoral fellows are

³ See *Regents of the Univ. of California*, 23 PERC (LRP) ¶ 70,025 1998 PERC LEXIS 197 (Cal. PERB Dec. 11, 1998) (University of California at Los Angeles); *Regents of the Univ. of California*, 22 PERC (LRP) ¶ 29,084, 1998 PERC LEXIS 54 (Cal. PERB Apr. 23, 1998) (University of California at San Diego); *Florida A&M University Graduate Assistants United*, Docket No. RC-97-010, Order No. 97E-067 (Fla. PERC Apr. 1, 1997); *United Faculty of Florida*, 3 FPER 304 (1977), *aff’d* 368 So.2d 641 (Fla. App. 1979), *cert. denied*, 379 So.2d 202 (Fla. 1979); *Kansas Ass’n of Public Employees*, Case No. 75-UD-1-1992 (Kan. PERC Oct. 17, 1994); *Board of Trustees/University of Massachusetts*, 20 MLC 1453 Case No. SCR-2215 (Mass. LRC 1994); *Regents of the University of Michigan*, 1981 MERC Lab. Op. 777, Case No. C76 K-370 (Mich. ERC Nov. 4, 1981); *Michigan State University*, 1976 MERC Lab. Op. 73, Case No. R75 D-197 (Mich. ERC 1976); *Communications Workers of America/Graduate Student Employees Union, AFL-CIO*, 24 NYPER (LRP) ¶ 3035, 1991 NYPER LEXIS 2523 (N.Y. PERB 1991), *aff’d*, 181 A.D.2d 391, 586 N.Y.S.2d 662 (N.Y. App. Div. 1992); *Communications Workers of America/Graduate Student Employees Union, AFL-CIO*, 25 NYPER ¶ 3000, 1992 NYPER LEXIS 2877 (N.Y. PERB Dec. 30, 1992); *University of Oregon Grad. Teaching Fellows Fed’n*, Case No. C-207-75 (Oregon Pub. Empl. Rel. Bd. 1977); *Temple University*, Case No. PERA-R-99-58-E (Pa. Labor Relations Board).

both students and employees.”); *Bd of Trustees/Univ. of Mass.*, Case No. SCR-2215, p. 12 (“[T]he [graduate] assistants’ status as University students is not inconsistent with their status as public employees.”); *United Faculty of Florida*, 3 FPER 304, 306 (“Graduate Assistants are possessed of dual status; they are both students and employees. The fact that they are students does not detract from the fact that they are also employees.”); *CWA/GSEO and State of New York (State University of New York)*, 24 PERB ¶ 3035 (“[T]he GAs’ and TAs’ dual status as University students and employees does not necessarily negate the existence of covered employment. The relationship embraced in the dual status of student/employee are not mutually exclusive.”). These decisions are highly significant for two reasons. First, all of the state agencies normally give great weight to NLRB decisions on parallel questions. Thus, they represent a significant departure from this practice. Second, these agencies regulate labor relations in many of the premier institutions of higher education in the U.S., for example, the University of Michigan. Nothing in *Brown* supports a different approach under the federal Act.

The *Brown* majority asserted that the relationship between universities and graduate assistants is “primarily an educational one, rather than an economic one.” *Brown*, 342 NLRB at 489. This is so because graduate assistantships are “directly related to the core elements of the Ph.D. degree” and the money received by graduate assistants “is not consideration for work” but “financial aid to a student.” *Id.* at 488-9.

The *Brown* majority clearly misunderstood the economic relationship between graduate assistants and their universities. As the *Restatement* points out, “[w]here an educational institution compensates student assistants for performing services that benefit the institution, . . . such compensation encourages the student to do the work for more than educational benefits and thereby establishes an employment as well as an educational relationship.” § 1.02, p. 25. The

compensation funds the graduate assistant's education, but it is only offered in exchange for providing the service of the assistantship. This is Columbia's belief. A letter to Longxi Zhao terminating him from his teaching assistant position reads, in part, "[T]his termination is effective immediately. As a result, you will no longer receive a salary for this position." Pet. Ex. 20. While the university still paid for the remainder of Mr. Longxi's term, this letter makes clear that he was receiving compensation for a service.⁴

In *Kansas Association of Public Employees v. Kansas Board of Regents*, Case No. 75-UD-1-1992, the Kansas Public Relations Board described the economic purpose of graduate assistantships. According to an administrative officer in the English Department at the University of Kansas, "the reason the Department was hiring more [Graduate Teaching Assistants] and fewer faculty was because GTAs are much cheaper to hire. She never heard it stated that by using more GTAs the Department was providing an educational opportunity to a greater number of graduate students." *Kansas Assoc.*, at p. 14. The Kansas PERB added:

The opportunity to fund one's education is a significant factor in the selection of the graduate school to attend. The importance of such programs as GTAs comes from their ability to assist a graduate student to support his education rather than because they enhance the education itself. Generally, GTA appointments satisfy an economic concern of graduate students rather than an academic concern. The Physics and Astronomy Department discovered that if graduate students were not offered a GTA they did not enroll at the University. It was the money that brought them to the University. *Id.* at 15 (citations to record omitted).

The PERB further found that the University "can nurture teaching in ways other than formal classroom instruction as a GTA," relying on the testimony of an associate professor to

⁴ The termination letter informed Mr. Longxi, "[I]n an effort to work with you, since this decision was recently made, your tuition for the Spring 2015 term will be paid for by the academic department. A teaching assistant position, although a useful funding source, is not a requirement for the doctoral degree." Pet Ex. 20. The Employer, therefore, agreed to pay the remainder of Mr. Longxi's term, but it appears it was not obligated to. And while the teaching assistantship was not required to complete the doctoral degree, it was a useful source of funding to achieve that degree.

demonstrate other ways graduate students could learn to be effective teachers. *Id.* Furthermore, at a time when outside fellowship money was easily available, the Physics Department had to require all graduate students hold a GTA to be able to meet its course teaching requirements. *Id.* *Brown*'s theory that the relationship between graduate assistants and their universities are not economic fails when confronted with these realities.

Lastly, the *Brown* majority justified excluding graduate assistants from the protections of the Act based on concerns about academic freedom. *See Brown* 342 NLRB at 490-93. The majority believed "there is a significant risk, and indeed a strong likelihood, that the collective-bargaining process will be detrimental to the educational process." *Id.* at 493. But the Board cannot narrow the terms of the Act based on policies drawn from other sources and far outside its expertise. Moreover, all existing empirical evidence undermines this unsupported conjecture, as does the decades of productive collective bargaining at premier public universities. Moreover, many state courts and agencies have rejected the concern that academic freedom would be threatened by graduate assistants exercising collective bargaining rights.

As the *Brown* dissent pointed out, the majority's fears that collective bargaining would harm academic freedom "are not only unsupported" by empirical evidence, "but are actually contradicted." *Id.* at 499. The dissent cited one study that concluded collective bargaining *enhances* the mentoring relationship between graduate assistants and faculty; it further cited a survey in which faculty members stated, based on their experience, that collective bargaining "does not inhibit their ability to advise, instruct, or mentor their graduate students." *Id.* at 500 (emphasis omitted). Additionally, a recent survey of graduate assistants found that collective bargaining did not harm their relationships with faculty mentors. Sean E. Rogers et al., *Effects of Unionization on Graduate Student Employees: Faculty-Student Relations, Academic Freedom,*

and Pay, 66 Ind. & Lab. Rel. Rev. 487 (2013). These studies undermine the *Brown* majority's concerns about academic freedom, but more importantly, they undermine that majority's foray into setting academic policy. In the words of the *Brown* dissent, "[T]he majority's policy concerns are not derived from the Act at all, but instead reflect an abstract view about what is best for American higher education – a subject far removed from the Board's expertise." *Id.* at 497.

Decades worth of collective bargaining experience at public universities should further allay the *Brown* majority's concerns about academic freedom. And several of the state court and agency decisions that recognized graduate students' bargaining rights expressly rejected objections based on academic freedom as a basis denying these employees their rights. In *Temple Univ.*, *supra*, the Pennsylvania Labor Relations Board rejected the employer's claim that graduate assistant collective bargaining would interfere with academic freedom precisely because the employer provided no evidence to support this contention. P. 4. The Kansas PERB and Massachusetts Employment Relations Commission dismissed academic freedom arguments because the employers failed to provide any evidence to support their contentions and also because the obligation to bargain is limited to mandatory subjects of bargaining, does not apply to core management decisions, and does not impose an obligation to agree to any proposals. *Kansas Assoc. of Public Employees*, at 46-47; *Board of Trustees/Univ. of Mass.*, at 17-18. The analysis of these state agencies is equally applicable here. There is no reason for the NLRB to be out of sync with these state decisions. Notably, no state has reversed its decision to grant graduate assistants collective bargaining rights due to interference with academic freedom, or for any other reason for that matter.

The *Brown* decision's policy judgments are empirically baseless, out of sync with nearly all state court and agency decisions on the matter, and outside the Board's expertise. They do not justify excluding graduate assistants from the coverage of the Act. *Brown* should be reversed.

2. If the Board modified or overrules *Brown University*, *supra*, what should be the standard for determining whether graduate student assistants engaged in research are statutory employees, including graduate student assistants engaged in research funded by external grants? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000)(relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974)).

As there are no compelling policy reasons to exclude graduate assistants from the Act, the standard for determining whether research assistants are statutory employees should be the same as for any graduate assistant – whether they meet the common law definition of employee. According to the *Restatement of Employment Law*, graduate research assistants do. As discussed *supra*, the *Restatement's* illustration related to student assistants is directly on point with the question presented. It states that a graduate student who, in order to complete degree requirements, works as a researcher in a professor's laboratory and is supported by grants obtained by the professor is an employee of the university. § 1.02, p. 25. The university is providing the student with “significant benefits both in order to further [the student's] education and also to obtain [the student's] services on [the university's] funded research.” *Id.*

The question presented seeks to determine if a different approach should be taken with respect to research assistants funded by external grants. Treating research assistants differently simply because the ultimate source of their compensation is an external grant would not be a sound approach. Nearly all research assistants at Columbia are funded through external grants, yet even the Employer agrees that most of these research assistants belong in the bargaining unit if *Brown* is overruled. See SDODP 13-15; Post-Hearing Brief of the Trustees of Columbia

University in the City of New York (Employer Post-Hearing Brief), p. 67. Additionally, the holding in *Research Foundation-SUNY*, 350 NLRB 197 (2007), undermines any argument that the fact that research assistants are externally funded is inconsistent with employee status. In that case, graduate students assisted in externally funded research projects under the auspices of an entity set up by the university to manage its research awards. *Id.* These graduate students were held to be employees under the Act, even though they “must be enrolled at SUNY to work for the Employer,... their work assignments bear a substantial relationship to their SUNY dissertations,... they end their RPA careers once they graduate from SUNY, and ... the Principal Investigators on their funded research projects often simultaneously serve as their advisers on the dissertations they must complete to be awarded a graduate degree from SUNY.” *Id.* at 199. If *Brown* is overruled, research assistants who perform the same work directly for the university must be afforded the same bargaining rights at the graduate students in *Research Foundation-SUNY*.

The question presented cited *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000), in a manner that suggests it questioned whether externally funded research assistants are statutory employees. The excluded research assistants in *NYU*, however, were not excluded simply because they were externally funded. They were excluded because the Regional Director determined they “do not work or perform a service for an employer.” *Id.* at 1221 (quotation marks and citation omitted). These graduate assistants “have no expectations placed upon them other than their academic achievement.” *Id.* at 1220. They “are not required to commit a set number of hours performing specific tasks for NYU.” *Id.* The record showed that being placed in one of those research positions was “co-extensive with being a graduate student and there are no duties required” of them. *Id.* at 1215. The Regional Director determined these research

assistants were akin to those in *Leland Stanford Junior University*, 214 NLRB 621 (1974), where the relationship between the research assistants and the university was “not grounded on the performance of a given task where both the task and the time of its performance is designated and controlled by an employer.” *Id.* at 623. This is in contrast to other NYU research assistants who were also externally funded that the Regional Director included in the bargaining unit because those research assistants were “assigned specific tasks, and ... they work under the direction and control of the faculty member.” *New York University*, 332 NLRB at 1221, fn 51. Thus the determining factor for exclusion of certain research assistants in *New York University* was not whether they were funded by external grants, but whether they performed specific tasks under the direction and control of a faculty member. In the instant case, Columbia’s Research Officers largely work under the direction and control of the Principal Investigator in charge of fulfilling the terms of a grant. SDODP 13. These grants include descriptions of the work to be performed by each researcher. *Id.* Thus, while much of this work also contributes to completion of a student’s dissertation, these research assistants are performing specific tasks under the direction and control of a faculty member.

3. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, would a unit comprised of all these classifications be appropriate?

Whether graduate student assistants, terminal masters degree students, and undergraduate students may comprise an appropriate bargaining unit depends on whether they share a community of interest as employees. The traditional community of interest analysis examines various factors to determine whether there is sufficient mutual interest in terms and conditions of employment for a group of workers to band together for collective bargaining purposes. These factors include:

[W]hether the employees are organized into a separate department; have distinct skills and training; have distinct job functions and perform distinct work, including inquiry into the amount and type of job overlap between classifications; are functionally integrated with the Employer's other employees; have frequent contact with other employees; interchange with other employees; have distinct terms and conditions of employment; and are separately supervised." *Specialty Healthcare and Rehabilitation Center of Mobile*, 357 NLRB No. 83, slip op. 9 (2011)(quoting *United Operations, Inc.*, 338 NLRB 123, 123 (2002)).

There is no reason to require doctoral students to be in a separate unit from terminal masters students and undergraduates if all these workers share a community of interest.

The question presented implies there may be a reason to exclude masters and undergraduate students due to their different statuses as students, as opposed to simply focusing on their job classifications. However, Board precedent teaches that the community of interest analysis should focus on the job classifications, and not individual's status outside of employment. For instance, whether work-release inmates share a community of interest with other employees in proposed bargaining units is "determined solely on the status of the [work-release] employees while in the employee relationship." *Speedrack Products Group Limited*, 325 NLRB 609, 609 (1998). *See also Winsett-Simmonds Engineers, Inc.*, 164 NLRB 611, 612 (1967) (finding work-release inmates shared a community of interest while analyzing job functions, relying on similar approach by the Board towards members of the Armed Services working in part-time civilian employment). Thus, Columbia's suggestions that doctoral students and masters and undergraduate students do not share a community of interest because doctoral students have "different interests and objectives" in their appointments is inapposite. Columbia Conditional RFR, p. 9-10. The community of interest analysis should focus solely on the terms and conditions of employment in the various job classifications in the petitioned-for unit, as opposed to the student status of the individual holders of the job classification.

When the traditional community of interest analysis is applied to those job classifications, it is clear that their occupants do share a community of interest. All the occupants of job classifications in the petitioned-for unit, except Course Assistant, are “Student Officers.” SDODP 8. These workers are appointed to one or more terms, and they can only hold one appointment at a time. *Id.* They further all need to be enrolled at Columbia University to receive an appointment. *Id.* When it comes to Instructional Officers, all the classifications (Preceptors, Teaching Fellows, Teaching Assistants, Readers, and Teaching Assistant III) participate in grading. *Id.* 10-12. Most participate in assisting undergraduate students in varied forums ancillary to large classes by: running labs or problem sessions (Teaching Assistant IIIs), holding office hours or leading discussion sessions (doctoral Teaching Assistants and Fellows), leading discussions or laboratory sessions (masters Teaching Assistants), or staffing Help Rooms (Teaching Assistant IIIs and doctoral Teaching Assistants). *Id.* 10, 30. Some Teaching Assistants and Fellows independently teach classes, as do Preceptors. *Id.* 10, 11-12. All Research Officers perform similar research duties in assistance to faculty members. *Id.* 13-14. The Regional Director correctly pointed out that the masters and undergraduate students “are performing duties identical or nearly identical to doctoral student assistants, often side-by-side with doctoral students.” *Id.* 30. All the student-employees share a community of interest, regardless of their varied student status. Therefore, a unit comprised of doctoral, masters, and undergraduate students would be appropriate.

It may be that a unit of solely the doctoral students would also be appropriate, as might a unit of just the masters and undergraduate students. “[T]here may be multiple... appropriate units in any workplace.” *Specialty Healthcare, supra*, slip op. at 31. This is because “employees may seek to organize ‘a unit’ that is ‘appropriate’ – not necessarily *the* single most appropriate

unit.” *American Hospital Association v. NLRB*, 499 U.S. 606, 610 (1991) (emphasis in original).

Ultimately, the employees are empowered to choose which appropriate unit they seek to organize themselves into for collective bargaining purposes. Here, these graduate assistants have chosen an inclusive appropriate unit. There is no basis to disturb that choice.

4. If the Board concludes that graduate student assistants, terminal masters degree students and undergraduate students are statutory employees, what standard should the Board apply to determine whether they constitute temporary employees?

Columbia University argues in its Conditional Request for Review that masters and undergraduate students should be excluded *from any unit* because they are temporary employees. Columbia CRFR, 13 (emphasis added). Member Miscimarra further questioned whether the petition in The New School, Case No. 2-RC-143009, could be dismissed because graduate student assistants may be “temporary” or “casual” employees. Board Order Granting Petitioner’s Request for Review, Case No. 2-RC-143009, p. 2 (dissent). The position that temporary workers should be excluded from any bargaining unit misunderstands the Board’s precedent on temporary workers. Further, no state court or agency has denied collective bargaining rights to graduate assistants because they were temporary employees.

“[A] finding of temporary status turns on evidence that the employee has been hired for only a short period, and has no reasonable expectation of being rehired. Under such circumstances the temporary employees lack a community of interest with the rest of the work force.” *University of San Francisco*, 265 NLRB 1221, 1223 (1982). But Columbia does not argue that the masters and undergraduate students should be excluded from a unit of doctoral students because the masters and undergraduate students are so temporary as to not share a community of interest with the doctoral students. It claims that the masters and undergraduates are temporary and, therefore, should be excluded from *any unit*. The Board has already rejected

that proposition. “The logical consequence of the Employer’s argument is that temporary or intermittent employees cannot exercise the rights vested in employees by Section 9 of the Act. However, no such exclusion appears in the definition of employees or elsewhere in the Act.” *Kansas City Repertory Theatre, Inc.*, 356 NLRB No. 28, slip op. 3 (2010). Temporary employees are excluded from bargaining units with regular, permanent employees where the two groups do not share a community of interest due to the tenuous nature of the temporary employees’s employment. Temporary employees are not wholly excluded from the Act. *Id.* at 3, fn. 4 (noting a lack of citation to cases where a petition for an election was dismissed solely because the group of workers seeking representation were temporary). Therefore, even if the masters and undergraduate students were “temporary,” that would not be a basis to deny them the Act’s coverage.

No state court or agency has denied graduate assistants collective bargaining rights because they are temporary or casual employees. To the contrary, decisions granting bargaining rights have explicitly rejected the argument that those rights should be denied because of the temporary nature of graduate assistants’ employment. *See CWA/GSEU, supra*, p. 3 (“reject the State’s contention that the GAs’ and TAs’ employment relationship is casual and not covered” where GAs and TAs regularly work 15-20 hours per week throughout the University’s academic year), *Temple University, supra* p. 4-5, *Board of Trustees/Univ. of Mass., supra*, p. 13-14, *Regents of the Univ. of Cal. v. PERB*, 41 Cal.3d at 623-624. There is no reason for the Board to adopt a different approach than the state courts and agencies.

Not only is there no basis for excluding masters and undergraduate students from the Act’s coverage because they are temporary employees, even the cases involving exclusion of temporary employees from a unit of permanent employees involve a wholly different situation

than exists here. In those cases, one group of employees is temporary and another group is permanent. *See, e.g., Hygeia Coca-Cola Bottling Co.*, 192 NLRB 1127, 1129 (1971) (“In view of their different conditions of employment and the absence of any expectancy of permanent employment, we find that the summer students do not share a community of interest with any of the unit employees.”). Here, all the employees are in some sense temporary in that they all expect to leave the University’s employment after some period of years. Moreover, the record indicates that all the graduate assistants – whether doctoral, masters, or undergraduate students – hold one appointment at a time, with these appointments lasting one or two terms. SDODP 9. So all the graduate assistants are only in each appointment for a set period lasting one to two terms. The only difference among the graduate assistants is in the average number of appointments they receive as a group. Columbia demonstrated that doctoral students on average hold appointments for over nine terms, while masters and undergraduates average nearly two terms. SDODP 30. That difference does not give rise to the type of disparity of interests that led the Board to exclude temporary employees from units of permanent employees in prior cases.

There may certainly be student employees at universities whose employment is so short or intermittent that the students are casual employees who do not share a community of interest with other graduate assistants. For instance, students hired to grade papers on an as-needed basis might be too casual to be included in a graduate assistant unit. In the instant case, for example, it appears that Course Assistants and Graders are appointed for at least a full term and perform their duties consistently. Employer Post-Hearing Brief, p. 38. However, if they were simply engaged as a need arises, and they performed their tasks intermittently, the Course Assistants and Graders might be too temporary or casual to share a community of interest with the rest of the graduate assistants in the petitioned for unit. But that is not the argument made by the University

here, and there appears to be no basis for excluding any of the classifications petitioned-for as too temporary or casual to warrant inclusion.

Conclusion

For the reasons stated above, the AFL-CIO urges this Board to overrule *Brown*.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Maneesh Sharma, hereby certify that on February 29 2016, I caused to be served a copy of the foregoing Brief on behalf of the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae in Columbia University, Case 02-RC-143012, by electronic mail on the following:

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